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8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**

10 **KEVIN WALKER,**

1:02-cv-05801-AWI-LJO-P

11 **Plaintiff,**

**ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS IN PART**

12 **vs.**

ORDER DISMISSING CLAIMS

13 **UNITED STATES OF AMERICA,
et al.,**

**ORDER REFERRING ACTION TO
MAGISTRATE JUDGE**

14 **Defendants.**
15 _____/

16 **BACKGROUND**

17 Kevin Walker ("Plaintiff") is a federal prisoner housed at Taft Correction Institution
18 ("Taft") and is proceeding pro se and in forma pauperis in this civil rights action pursuant to
19 Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

20 The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. §
21 636(b)(1)(B) and Local Rule 72-302.

22 On October 5, 2006, the Magistrate Judge screened the second amended complaint, filed
23 on August 29, 2005 ("complaint"). The Magistrate Judge then filed Findings and
24 Recommendations that recommended the claims against Taft, Wachenhut Correctional
25 Corporation ("WCC"), and Taft Employees be dismissed because no Bivens cause of action is
26 available. The Findings and Recommendations also recommended the tort claims against the
27 Federal Defendants be dismissed because the Federal Tort Claims Act ("FTCA") requires all
28 such suits to be against the United States only. Finally, the Findings and Recommendations

recommended that the tort claim against the United States, alleging that Plaintiff was transferred to a facility the United States had constructed upon soil it knew contained spores that cause Valley Fever, be allowed to proceed because Plaintiff had exhausted his administrative remedies on this issue. The Findings and Recommendations were served on Plaintiff, along with those Defendants that have made an appearance in this action. The Findings and Recommendations contained notice that any objections to the Findings and Recommendations were to be filed within thirty (30) days. On November 13, 2006, Plaintiff filed objections to the Magistrate Judge's Findings and Recommendations.

DISCUSSION

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 73-305, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds that portions of the Findings and Recommendations are supported by the record and by proper analysis. However, in light of the changing law concerning Bivens actions, the court declines to fully adopt the Findings and Recommendations.

A. Bivens Action Against BOP Employees

The complaint appears to allege violations of Plaintiffs' Eighth Amendment rights against Bureau of Prison ("BOP") Employees. In Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court established a direct cause of action under the Constitution of the United States against federal officials for the violation of federal constitutional rights. In Bivens, the Supreme Court held that a violation of the Fourth Amendment by a federal agent acting under color of his authority gives rise to a cause of action for damages, despite the absence of any federal statute creating liability. Bivens, 403 U.S. at 389. The right of a Bivens action was extended in Carlson v. Green, 446 U.S. 14 (1980), to recognize an implied action for damages against federal prison officials for violations of the Eighth Amendment.

The Findings and Recommendations did not address whether the complaint stated a Bivens claim against BOP Employees. Because it appears that the complaint is at least attempting to state an Eighth Amendment claim against BOP Employees, the court declines to

adopt the Findings and Recommendations and dismiss BOP Employees as Defendants to potential Eighth Amendment claims.¹ The court will refer this action back to the Magistrate Judge to screen the complaint's allegations that the BOP Employees violated Plaintiff's Eighth Amendment rights.

B. Bivens Action Against United States

The complaint appears to allege Eighth Amendment violations by the United States and the BOP. No Bivens claim lies against the United States. Cato v. United States, 70 F.3d 1103, 1110 (9th Cir. 1995). In addition, a Bivens action is not available against a federal agency. FDIC v. Meyer, 510 U.S. 471, 484 (1994); Consejo de Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1173 (9th Cir. 2007). Thus, to the extent Plaintiff is attempting to sue the BOP or the United States for violations of his Eighth Amendment and other constitutional rights, Plaintiff cannot state a claim. Accordingly, the Constitutional claims against the BOP and the United States must be dismissed.

C. Bivens Action Against Taft and WCC

The complaint appears to allege violations of the Constitution by Taft and the company who owns Taft, Wachenhut Correctional Corporation ("WCC"). The Supreme Court has declined to extend Bivens claims to allow for recovery against private entities acting under contract with the federal government, such as private prisons Correctional Serv. Corp. v. Malesko, 534 U.S. 61, 63 (2001). Thus, Plaintiff's constitutional claims against Taft and WCC must be dismissed.

D. Bivens Claims Against Taft Employees

The complaint appears to allege violations of the Constitution by Taft Employees. The Magistrate Judge found that a Bivens action is not available against employees at a private prison and recommended the court dismiss these claims. While the Supreme Court has refused to extend a Bivens remedy to suits against private entities, see Malesko, 534 U.S. at 62, the

¹ In making this finding, the court has not determined if the complaint in fact states an Eighth Amendment claims against the BOP employees. The court only finds that potential Eighth Amendment claims against BOP Employees should not be dismissed without further screening.

1 Supreme Court has never addressed the issue of a federal prisoner's right to a Bivens action
2 against prison guards and employees at a private prison. Those courts that have addressed the
3 issue have indicated that the availability of a Bivens action is premised on whether there is
4 another remedy against the private prison employee.

5 In Peoples v. Corrections Corp. of America, the plaintiff was housed at CCA, a private
6 Maryland corporation under contract with the United States Marshals Service. Peoples v.
7 Corrections Corp. of America, 2004 WL 2278667, *1 (D.Kan. 2004). The plaintiff claimed that
8 officers of CCA violated his due process rights as a pretrial detainee by placing and keeping him
9 in segregation, denying him access to a law library or legal resources, and denying him
10 unmonitored phone calls to his attorney. Id., 2004 WL 2278667 at *4. The district court found
11 that it was unlikely that the plaintiff had a Bivens action against an individual employee of a
12 federal contractor where alternative remedies, including state tort action, were available. Id.
13 2004 WL 2278667 at *3 -4. On appeal, the majority of a divided Tenth Circuit panel held that
14 "federal prisoners have no implied right of action for damages against an employee of a privately
15 operated prison under contract with the United States Marshals Service when state or federal law
16 affords the prisoner an alternative cause of action for damages for the alleged injury." Peoples v.
17 CCA Detention Centers, 422 F.3d 1090, 1108 (10th Cir. 2005). However, an en banc panel of
18 the Tenth Circuit could not reach agreement on this issue, and held as follows:

19 We are evenly divided, however, for substantially the same reasons as are set forth
20 in the panel's majority and dissenting opinions, on the question whether a Bivens
21 action is available against employees of a privately-operated prison. Because there
22 is no majority on the en banc panel, the district court's ruling in Peoples II on this
23 issue is affirmed by an equally divided court.

24 Peoples v. CCA Detention Centers, 449 F.3d 1097, 1099 (10th Cir. 2006) (en banc). Thus, in the
25 Tenth Circuit, based on the district court's opinion, it is unlikely that a federal prisoner has a
26 Bivens action against an employee of a federal contractor if alternative remedies are available.

27 The Fourth Circuit reached a similar position in Holly v. Scott, 434 F.3d 287 (4th Cir.
28 2006). In Holly, the Fourth Circuit found that an "inmate in a privately run federal correctional
facility does not require a Bivens cause of action where state law provides him with an effective
remedy." Holly v. Scott, 434 F.3d 287, 296 (4th Cir. 2006). In making this finding, the Fourth

Circuit noted that such an inmate would enjoy state law claims that a federal prisoner would not. Id. at 296-97.

In recommending dismissal, the Magistrate Judge relied on both Peoples and Holly. However, at this stage of the proceedings, it is difficult to ascertain if Plaintiff has alternative remedies available. Given that no Defendant has answered the operative complaint, Taft Employees have not asserted that a Bivens action is not available against them nor have they provided their position on whether Plaintiff has any remedies under state law. As such, the court declines to conclusively find, at this stage of the proceedings, that Plaintiff does not have any Bivens causes of action against Taft Employees.² The court will refer this action back to the Magistrate Judge to screen the complaint's allegations that Taft Employees violated Plaintiff's Eighth Amendment rights.

E. Negligence / Tort Claims Against BOP Employees and BOP

The complaint appears to allege negligence claims against BOP Employees and the BOP. The FTCA provides the exclusive remedy for "injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or employment" 28 U.S.C. § 2679(b)(1). The United States is the only proper defendant in a suit brought pursuant to the FTCA. FDIC v. Craft, 157 F.3d 697, 706 (9th Cir. 1998); Kennedy v. United States Postal Serv., 145 F.3d 1077, 1078 (9th Cir. 1998). Because only the United States may be sued for injuries arising from the negligent acts of BOP employees, the negligence claims against BOP Employees and the BOP must be dismissed.

F. Negligence / Tort Claims Against United States

The complaint appears to allege negligence claims against the United States. An action against the United States caused by the negligent or wrongful act or omission of a United States employee can only proceed if the claimant has first presented his claim to the appropriate Federal

² In making this finding, the court has not determined if the complaint in fact states an Eighth Amendment claims against Taft Employees. The court only finds that the potential Eighth Amendment claims against Taft Employees should not be summarily dismissed.

1 agency and had his claim denied by the agency. 28 U.S.C. § 2675(a). This exhaustion
 2 requirement is jurisdictional and must be strictly adhered to. Brady v. United States, 211 F.3d
 3 499, 502 (9th Cir. 2000).

4 The Magistrate Judge already concluded that Plaintiff's negligence claim against the
 5 United States had been exhausted. As such, this action may proceed on Plaintiff's negligence
 6 claim against the United States in which Plaintiff alleges that he was transferred to a facility that
 7 was constructed by the United States with knowledge that the soil upon which it was built was
 8 contaminated with fungal spore that are known to cause Valley Fever.

9 **G. Negligence / Tort Claim Against Taft Employees, Taft, and WCC**

10 The complaint appears to allege that Taft Employees, Taft, and WCC were negligent in
 11 failing to diagnosis and treat Plaintiff's coccidioidomycosis, more commonly known as Valley
 12 Fever. The Findings and Recommendations did not address Plaintiff's potential negligence and
 13 tort claims against Taft Employees, Taft, and WCC.

14 A FTCA claim is only for the negligent or wrongful conduct of federal employees or
 15 agencies. FDIC v. Meyer, 510 U.S. 471, 477 (1994). One who is not an "employee" of the
 16 federal government cannot subject the United States to liability under the FTCA. United States
 17 v. Orleans, 425 U.S. 807, 813 (1976). The statutory definition of "employee" does not list
 18 contractors with the United States. See 28 U.S.C. § 2671. Thus, it does not appear the FTCA
 19 would apply to Taft Employees, Taft, or WCC. Accordingly, presuming the complaint states a
 20 claim for negligence against these Defendants, the FTCA would not bar tort claims against them.

21 The court declines to conclusively find, at this stage of the proceedings, that Plaintiff may
 22 not maintain tort claims against Taft Employees, Taft, and WCC.³ The court will refer this
 23 action back to the Magistrate Judge to screen the complaint's allegations that Taft Employees,
 24 Taft, and WCC committed torts against Plaintiff.

27 ³ In making this finding, the court has not determined if the complaint in fact states any tort claims. The
 28 court only finds that the potential tort claims against Taft Employees, Taft, and WCC are not barred by the FTCA as
 implied in the Findings and Recommendations.

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. The court adopts in part and declines to adopt in part the Findings and Recommendations, filed October 5, 2006;
2. The Eighth Amendment claims brought pursuant to Bivens against the United States and BOP are DISMISSED with prejudice;
3. The Eighth Amendment claims brought pursuant to Bivens against Taft and WCC are DISMISSED with prejudice;
4. The negligence and tort claims against BOP Employees and the BOP are DISMISSED with prejudice;
5. This action may proceed at this time pursuant to Bivens on the complaint's allegations that BOP Employees violated Plaintiff's Eighth Amendment rights;
6. This action may proceed at this time pursuant to Bivens on the complaint's allegations that Taft Employees violated Plaintiff's Eighth Amendment rights;
7. This action may proceed against the United States on the complaint's allegation that United States' employees transferred Plaintiff to a facility that was constructed by the United States with knowledge that the soil upon which it was built was contaminated with fungal spore that are known to cause Valley Fever;
8. This action may proceed at this time against Taft Employees, Taft, and WCC for torts alleged in the complaint.
9. This action is REFERRED to the Magistrate Judge to screen the complaint to determine if it legally states a claim pursuant to Rule 8 of the Federal Rules of Civil Procedure on those claims remaining in the complaint.

IT IS SO ORDERED.

Dated: May 30, 2007

/s/ Anthony W. Ishii
UNITED STATES DISTRICT JUDGE